BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Petition for a Declaratory Ruling that Early Termination Fees Are "Rates Charged for Wireless Service"	)	Docket No. 05-194
	)	
In the Matter of	)	
	)	
Clarification That Early Termination Fees Charged to Cellular Telephone Customers Are "Rates Charged" Within the Meaning of 47 U.S.C. § 332(c)(3)(A)	)	Docket No. 05-193

**REPLY OF WIRELESS CONSUMERS ALLIANCE, ET AL.
TO "WHITE PAPER" OF VERIZON WIRELESS**

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I. INTRODUCTION AND SUMMARY

A recent *ex parte* submission by Verizon Wireless urges the Commission to abandon a bright-line rule it has repeatedly emphasized, and to "cross[] the Rubicon" by declaring that 47 U.S.C. § 332 preempts state contract laws of general applicability.[1] Verizon offers the Commission comfort that doing so "would not require the Commission to break any new legal ground or divest the states of jurisdiction over traditional contract claims."[2] But that is false comfort. The CTIA petition asks the Commission to cross the Rubicon and, once on the other side, not only to "break new legal ground" but to take a wrecking ball to centuries of traditional contract-law doctrine. Commenting parties Wireless Consumers Alliance, Inc. *et al.* (hereinafter, "WCA")[3] submit that there is nothing in § 332, or the Commission's prior rulings on its preemptive scope, that would justify such a radical step; and there are at least four reasons the Commission should not grant the extraordinary relief CTIA requests.

First, the Commission's prior orders concerning the scope of preemption have adhered to a bright-line rule that state laws of general applicability (*i.e.*, those that do not specifically target the wireless industry) are not preempted by § 332. There is no reason to abandon that bright-line rule to exempt the CMRS industry from the same longstanding restrictions on contractual penalties that apply to every other industry – and have for centuries. Doing so would leave state courts unable to apply longstanding contract-law doctrines and thus would seriously undermine the ability of state courts to address routine contract disputes.

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[1] Verizon March 30, 2006 *ex parte*, at 22.

[2] *Id.*, title page.

[3] The parties making this submission are Wireless Consumers Alliance, Inc., Porsha Meoli, Leslie Armstrong, Sridhar Krishnan, Astrid Mendoza, Christina Nguyen, Bruce Gatton, Kathryn Zill, Richard Samko and Amanda Selby.

Second, generally applicable restrictions on liquidated damages clauses do not require courts to engage in a "regulatory type of analysis" prohibited by *Wireless Consumers Alliance*, 15 FCC Rcd. 17021, ¶ 39 (2000) (hereafter, "*WCA*"). The only inquiry under such state-law provisions that has anything to do with the "reasonableness" of the liquidated damages amount is whether that amount is a reasonable approximation *of the actual loss* resulting from the breach of contract. Restatement (Second) Contracts, § 356(1). The state laws that restrict liquidated damages and prohibit contractual penalties do not require a court to determine the reasonableness *of any charge for CMRS service*.

There is a significant difference between considering the reasonableness of the charge for service, on the one hand, and a determination of whether the amount specified in a contract as liquidated damages is a reasonable estimate *of the loss* that would be suffered in the event of a breach of the contract. The latter inquiry does not involve any "regulatory type of analysis" because the contracted-for service price is accepted as a given. Neither the court's analysis of the legality of a particular ETF clause, nor the remedy should a particular ETF be found unlawful, would require a court to "determine the reasonableness of a prior rate or … set[] a prospective charge for services." *WCA*, 15 FCC Rcd. 17021, ¶ 39.

Third, although the CTIA petition was brought in reaction to a number of state court and arbitral cases challenging the legality of a variety of ETFs in CMRS contracts, the Commission has never before purported to make rulings on the preemption of specific claims or remedies pending before courts or arbitrators. And it should not do so here. None of the legal claims challenging ETFs, nor the evidentiary records supporting those claims, is before the Commission. At most, in keeping with prior precedent, the Commission can offer general guidance on the legal question of § 332's preemptive scope. But "the determination of whether any particular claim or remedy is consistent with Section 332 must be determined in the first instance by a state trial court based on the specific claims before it." *WCA*, 15 FCC Rcd. 17021, ¶ 28 .

Fourth, more than one year into this proceeding, neither CTIA nor any of the commenting parties has offered even a colorable legal basis on which the Commission could conclude that ETFs are "rates charged" for CMRS service. Verizon, in its recent *ex parte* filing, provides no support for the characterization of ETFs as rates. Instead, it simply assumes, without explanation or elaboration, that they are rates, and it ignores or grossly mischaracterizes the substantial body of case law that holds unequivocally to the contrary. The most CTIA and its supporters can try to show is that ETFs *affect* rates – and, as WCA's recent *ex parte* filing rebutting the Declaration of Verizon witness Jerry Hausman shows, they have not even succeeded in doing that.[4]

Verizon argues in its *ex parte* submission that the Commission's *WCA* decision supports the relief CTIA is seeking. To the contrary, *WCA precludes* the relief that CTIA and its members have requested. In *WCA*, the Commission held that a state-court damages award or calculation is not necessarily a ruling on the reasonableness of the rates charged for CMRS service, and that a damage award that includes a refund or rebate is not necessarily a retroactive rate adjustment. The Commission made clear that only where a state conducts a "regulatory type of analysis that purports to determine the reasonableness of a prior rate or ... sets a prospective charge for services" is its ruling subject to potential challenge under § 332. *WCA*, 15 FCC Rcd. 17021, ¶ 39. Where, on the other hand, a state court applies longstanding and generally applicable state contract and consumer protection laws to determine whether a liquidated damages clause is enforceable

[4] In a prior *ex parte* filing submitted on March 23, 2006, WCA demonstrated that Professor Hausman's opinion that there is a direct connection between ETFs and rates for CMRS service was unreliable and baseless. WCA will shortly submit the declaration of a telecommunications economist that will further address this issue.

under state law, as the courts in the pending state-court litigation are being asked to do, it does not intrude on matters preempted by § 332, even if the court must "consider the price . . . charged[] for the purpose of determining the extent of harm or injury involved." *Id.*, at ¶ 38.

After the Commission decided *WCA*, CTIA sought reconsideration on the grounds that the agency should have looked to "filed rate doctrine" cases to interpret § 332, and should have ruled, in reliance on those cases, that any relief rendered by a state court that in any way affects or considers wireless prices is preempted. The Commission emphatically rejected CTIA's argument and denied reconsideration. *In re Wireless Consumers Alliance, Inc.*, *Order on Reconsideration*, 16 FCC Rcd 5618, 5620 (2001) (the "*WCA Reconsideration Order*"). The contentions that CTIA and its members are asserting in this proceeding are just warmed-over versions of the same arguments that they advanced, and that the Commission twice rejected, in the *WCA* proceeding.

II. PREEMPTION OF GENERALLY APPLICABLE STATE CONTRACT LAW WOULD BE A RADICAL STEP

The Commission's prior orders concerning the scope of preemption have adhered to a bright-line rule that state laws of general applicability (*i.e.*, those that do not specifically target the wireless industry) are not preempted by § 332. The Commission articulated this principle in *Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd. 19898 (1999), where it confirmed that § 332 did not create "a general exemption for the CMRS industry from the neutral application of state contractual or consumer fraud laws." *Id.* at 19902 ¶ 10. This was confirmed again in *WCA*, when the Commission repeated that "the CMRS industry is not exempt from the neutral application of state contractual or consumer fraud laws." *WCA*, 15 FCC Rcd. at 17025-26 ¶ 8.

The Commission again emphasized this bright-line rule repeatedly in its most recent preemption decision, *In re Truth-In-Billing*, 20 FCC Rcd 6448 (2005), stating: "we believe that states' enforcement of their own generally applicable contractual and consumer protection laws … would *not* constitute rate regulation under section 332(c)(3)(A)." *Id.* ¶ 53 (emphasis added); *see also id.* ¶ 2 ("We emphasize … that no action we propose will limit states' ability to enforce their own generally applicable consumer protection laws."); *id.* ¶ 20 ("At a minimum, we emphasize that no action that we take in this *Second Report and Order* and the *Declaratory Ruling* below limits states' authority to enforce their own generally applicable consumer protection laws …."); *id.*, Separate Statement of Chairman Michael K. Powell ("[N]o action that we take in this *Order* and the *Declaratory Ruling* below limits states' authority to enforce their own generally applicable consumer protection laws …."); *id.*, Separate Statement of Commissioner Kathleen Q. Abernathy ("I also want to make clear that nothing in this item diminishes the recognition that state governments play a critical role in protecting consumers, particularly through enforcement of generally applicable provisions that bar fraud and deceptive practices.").

Many of the pending state-law claims challenging ETFs are based on statutes more than a century old and restrictions on liquidated damages clauses that have been part of the common law since Blackstone. *See, e.g.*, *Hoag v. McGinnis*, 22 Wend. 163, 166 (N.Y. Sup. Ct. of Judicature 1839) ("To allow of the use of penalties as damages, at the unlimited discretion of the parties, would lead to the most terrible oppression in pecuniary dealings."). Thus, restrictions on contractual penalties apply alike to all contracts in all industries, whether they be contracts with butchers, bakers, candlestick makers, or CMRS carriers. They do not single out the CMRS industry for anything even remotely resembling rate regulation.

The CTIA petition asks the Commission to obliterate centuries of contract law precedent. Such a radical and far-reaching preemption ruling would raise difficult questions with respect to the enforcement of millions of CMRS subscriber contracts. If generally applicable state contract laws are preempted under § 332, would state courts remain able to enforce CMRS subscriber contracts? Would the Commission's preemption ruling permit CMRS carriers to assert ETF claims in state court while at the same time prohibiting subscribers from asserting the traditional defenses to the enforcement of penalty clauses?[5] Would such a regime fundamentally alter the balance of contract remedies and defenses in state courts for the benefit of CMRS carriers? Or would it federalize millions of contract disputes previously resolved in state small-claims court systems, creating a potential flooding of federal court and FCC dockets? These are far-reaching questions, to be sure. But if the Commission is being pushed to "cross[] the Rubicon," as the proponents of the CTIA petition acknowledge,[6] these are the questions that will inevitably present themselves on the other side.

It is the carriers, not the subscribers, who seek to invoke state contract laws to enforce their subscriber agreements, and it is the carriers who knowingly inserted liquidated damages provisions into those contracts, thereby implicating longstanding statutes and common-law rules of general applicability that prohibit unlawful penalties. Indeed, as WCA has demonstrated in prior filings, many carriers have deliberately imported the language of state liquidated damages

[5] This is the result suggested by the March 30, 2006 Verizon *ex parte* submission, which asserts, at page 16, that a state court should not be permitted to consider defenses to the imposition of an ETF based on "its size, its relation (or alleged lack thereof) to the carrier's costs, its punitive nature, or its anticompetitive effect." In other words, Verizon would have the Commission issue a blank check to "allow of the use of penalties as damages at the unlimited discretion of the [CMRS carriers]." *See Hoag v. McGinnis*, 22 Wend. at 166.

[6] Verizon March 30, 2006 *ex parte*, at 22.

statutes into the liquidated damages provisions of their subscriber contracts, in an effort to bolster their enforceability.

It would be both unfair and irrational to allow carriers to employ state contract laws to enforce their subscriber agreements, while at the same time immunizing them from the very liquidated damages laws that they themselves invoked by inserting an ETF clause into those agreements. Carriers cannot avail themselves of breach of contract laws but ignore all defenses. They cannot pick and choose which parts of state contract law they want to abide by. Nothing in either the language or the legislative history of § 332, or in any judicial or FCC decision interpreting the statute, suggests that Congress intended such an illogical and unfair result. Indeed, to the contrary, both § 332 and the Commission's decision not to impose rate regulation on CMRS carriers reflect a judgment that state contract law, rather than tariff-based regulation, should govern the CMRS marketplace. As the Commission held in *WCA*:

> We agree with those commentators who contend that Section 332 was designed to promote the CMRS industry's reliance on competitive markets in which *private agreements and other contract principles can be enforced*. It follows that if CMRS providers are to conduct business in a competitive marketplace, and not in a regulated environment, then *state contract and tort claims should generally be enforced in state courts*. We also agree with commentators who assert that enforcement of such laws through a monetary remedy is compatible with a free market. As Public Citizen asserts, "these duties fall no more heavily on CMRS providers than any other business."

WCA, 15 F.C.C. Recd. 17021, ¶24 (emphasis added).

III. GENERALLY APPLICABLE RESTRICTIONS ON LIQUIDATED-DAMAGES CLAUSES DO NOT REQUIRE COURTS TO ENGAGE IN A "REGULATORY TYPE OF ANALYSIS" PROHIBITED BY *WCA*

In *WCA*, the Commission explained that § 332 prohibits state courts from imposing damages measurements or injunctive remedies based on a "regulatory type of analysis that purports to determine the reasonableness of a prior rate or ... sets a prospective charge for services." *WCA*, 15 FCC Rcd. 17021, ¶ 39. Thus,

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Verizon argues that only generally applicable laws "that do not involve a reasonableness inquiry" can escape preemption under § 332.[7] If that were true, then huge swaths of contract law, which invokes the principle of "reasonableness" in a variety of settings, would be obliterated. For example, in measuring "general" damages under certain claims for breach of contract, courts may award a measure of damages that includes the "reasonable profit" that the non-breaching party would have earned if the contract had been performed. *See, e.g.*, Restatement (Second) Contracts, § 351, cmt. b. Courts have made such awards for centuries, for contract claims asserted across a broad variety of industries. This has never been considered "rate regulation" in any industry by any stretch of the imagination. Similarly, courts are required to interpret contracts in a manner that will render them "lawful, operative, definite, *reasonable*, and capable of being carried into effect, if it can be done without violating the intention of the parties." Cal. Civil Code §1643 (emphasis added). Nobody has ever suggested that applying this garden-variety principle of contract interpretation is an exercise in "rate regulation."

Verizon also contends that any consideration of the "cost-basis of the ETF" would be improper "regulatory type of analysis."[8] But again, consideration of avoided costs is something that courts have done for centuries in measuring damages. *See, e.g.*, Restatement (Second) Contracts, § 341 (detailing the "measurement of damages in general" by the value of performance, plus any incidental or consequential loss, "less … any cost or other loss that [the non-breaching party] has avoided by not having to perform"). Verizon's contention that § 332 prohibits any consideration of a CMRS carrier's costs in measuring damages for breach of contract finds no support in either the text of the statute or the language of *WCA*.

[7] Verizon March 30, 2006 *ex parte*, at 23.

[8] Verizon March 30, 2006 *ex parte*, at 22-23.

The "regulatory type of analysis" prohibited by *WCA* involves the determination of "the reasonableness of a prior rate or … a prospective charge *for services*." *WCA*, 15 FCC Rcd. 17021, ¶ 39 (emphasis added). *That* is not the type of analysis that would be involved in determining whether a particular ETF is an unlawful penalty. The only reasonableness inquiry is whether the amount of the ETF "is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss." Restatement (Second) Contracts § 356(1). *That* inquiry does not address the reasonableness of any charge *for services*. It is an inquiry that would accept the contracted-for service price as a given, then determine whether the amount of the ETF is a "reasonable … approximat[ion] of the actual loss that has resulted from the particular breach." *Id.* cmt. b. There is a significant difference between considering the reasonableness of the charge *for service*, on the one hand, and the reasonableness of a liquidated damages clause on the other hand.

Whether the contract is for CMRS service or any other type of good or service, a court need not determine a "reasonable price" for the underlying transaction in order to determine the legality of a liquidated-damages clause. For example, an agreement liquidating damages for breach of a contract to buy widgets would not require a court to determine whether the contracted-for widget price is reasonable. The price for the widget is established by the contract, and the reasonableness of the liquidated-damages clause is determined by reference to that price, not by second-guessing it. Courts can make this determination, as they have for centuries, without any inquiry into the reasonableness of the underlying contract price.

Nor would a court be required to engage in any "regulatory type of analysis" in determining the appropriate remedy should a particular ETF be found unlawful. For example, a court could order restitution or disgorgement of the unlawful ETF. Since that amount has already been fixed by the contract, no reasonableness inquiry, and no calculation of any sort, would be required. Or a court could grant declaratory relief holding a particular ETF to be unlawful. Or a court could enjoin enforcement of a particular ETF if it is found to be unlawful. None of these remedies would require a court to "determine the reasonableness of a prior rate or … set[] a prospective charge for services." *WCA*, 15 FCC Rcd. 17021, ¶ 39. CMRS carriers would remain free to set the charge for service at any level they wish. They would be prohibited only from imposing contractual penalties that "disregard the principle of compensation" in approximating damages based on that charge, whatever it might be. *See* Restatement (Second) Contracts § 356 cmt. a.

IV. THE COMMISSION SHOULD NOT ADDRESS THE MERITS OF ANY PARTICULAR CLAIM PENDING BEFORE A COURT OR ARBITRATOR

The CTIA petition seeks a blanket ruling from the Commission on how § 332 should be applied to a variety of state-law claims pending before courts and arbitrators in various jurisdictions. Such a ruling would represent a groundbreaking departure from Commission procedure and precedent.

Neither the state-law claims CTIA seeks to preempt, nor the evidentiary records supporting those claims, are presently before the Commission. Previously, the Commission has provided general guidance on § 332's preemptive scope while respecting the authority of courts and arbitrators to apply that guidance to the specific claims before them. In *WCA*, for example, the Commission addressed the general issue of whether damage awards against CMRS providers are preempted. *WCA*, 15 FCC Rcd. 17021 (2000). The Commission ruled as follows:

> We hold that Section 332 does not generally preempt the award of monetary damages by state courts based on state consumer protection, tort, or contract claims. *We note, however, that whether a specific damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case.*

The Commission further explained:

> We recognize the line between prohibited and permissible claims may not always be clear. *While we provide legal guidance on this issue in this order, the determination of whether any*

> *particular claim or remedy is consistent with Section 332 must be determined in the first instance by a state trial court based on the specific claims before it*.

Id. ¶ 28 (emphasis added).

Thus, if the Commission adheres to the approach that it outlined in *WCA* – as it should – the Commission will not address the merits of any specific claim pending before a court or arbitrator. Indeed, since neither the specific claims nor the evidence supporting them are before the Commission, it would be procedurally impossible to address them on this docket.

The procedural posture of *WCA* precisely parallels this docket. The *WCA* petition sought clarification of the preemptive scope of § 332 in the context of a pending state court case, *Spielholz v. Los Angeles Cellular Telephone Co.* The California Court of Appeals had stayed *Spielholz* to await the Commission's response to WCA's request for a declaratory ruling that § 332 would not preempt a state-court damage award. *See WCA*, 15 FCC Rcd. 17021, ¶ 2. Similarly, some courts have stayed pending ETF litigation to await the Commission's ruling on the CTIA petition.

"The WCA petition focuse[d] on the issue of whether, *as a matter of law*, the Communications Act preempts state courts from awarding monetary relief to consumers against CMRS providers for violating state consumer protection, tort, or contract laws." *Id.* ¶ 5 (emphasis added). WCA asserted that "the issue of the preemption of monetary damages can be decided as a matter of law without delving into the facts of the underlying [*Spielholz*] case." *Id.* at 17022 ¶ 3. The Commission agreed, and issued a ruling that provided guidance on the legal question of preemption without addressing whether any claim or remedy in the *Spielholz* case was or was not preempted. The general guidance offered by the Commission was that "Section 332 does not generally preempt the award of monetary damages by state courts based on state tort or contract claims." *Id.* at 17026 ¶ 9. But the

Commission tempered that ruling by noting that "whether a specific damage award is prohibited by Section 332 will depend on the specific details of the calculation methodology as applied in a particular case." *Id.* The Commission elaborated on this principle by stating that "an award of monetary relief would not normally require a court to prescribe, set or fix wireless rates," *id.* at 17040 ¶ 38, but that "a court will overstep its authority under Section 332 if, in determining damages, it does enter into a regulatory type of analysis that purports to determine the reasonableness of a prior rate or it sets a prospective charge for services," *id.* at 17041 ¶ 39.

After articulating these general principles, the Commission emphasized again that it would not resolve the merits of any specific claim or remedy at issue in *Spielholz* "or any other specific case":

> [W]hile we conclude that Section 332 does not generally preempt damages awards based on state contract or consumer protection laws, this is not to say that such awards can never amount to rate or entry regulation. Nor do we here conclude that a damage award in the WCA litigation [*Spielholz*] or any other specific case would or would not be consistent with Section 332(c)(3). We believe the question of whether a specific damage award or a specific grant of injunctive relief constitutes rate or entry regulation prohibited by Section 332(c)(3) would depend on all facts and circumstances of the case.

WCA, 15 FCC Rcd. at 17041 ¶ 39.

So too, does the question of whether a particular type of ETF is a "rate," and whether a state-law challenge to that ETF runs afoul of the principles set forth in *WCA*. Not all ETFs are the same. They vary by CMRS provider, and in some instances vary by state even for the same CMRS provider – for example, Cingular's ETF is prorated in some states and flat in others. Thus, the question of whether any particular ETF is or is not a rate "would depend on all facts and circumstances of the case." *See* WCA, 15 FCC Rcd. at 17041 ¶ 39. The Commission has no evidence before it from which it could make that determination with respect to any particular ETF. Similarly, the specific claims pending before a variety of courts and arbitrators vary as well. The claim in *Suncom*, apparently, is that the carrier breached the explicit terms of the contract by imposing an ETF it was not contractually entitled to charge. The claims in the California litigation are based on the requirements of particular state statutes that establish criteria for liquidated-damages clauses and prohibit consumer fraud and unfair and deceptive business practices. The claims before the American Arbitration Association are based on other state statutes and common law contract doctrines. There are differences among these claims, and it is not possible for the Commission, based on the current docket, to make a specific preemption determination with respect to any of these particular claims or the specific remedies at issue in these cases.

V. THE PROPONENTS OF THE CTIA PETITION STILL HAVE NOT SHOWN THAT ETFS ARE "RATES CHARGED" WITHIN THE MEANING OF THE STATUTE

Although they are inviting the Commission to "cross the Rubicon" and demolish large tracts of state contract law, CTIA and its member carriers have sent the agency on that mission without either a paddle or an axe. Thus, more than one year after the CTIA Petition was filed, neither CTIA nor its members have advanced even a colorable argument that ETFs are "rates charged" for wireless service. The Verizon March 30, 2006 *ex parte* filing is no exception: It asserts a great many arguments, but it is virtually silent on the single issue that matters most – whether ETFs are "rates charged." Because WCA has addressed this question at length in its initial comments[9] and in subsequent filings, we will not burden the Commission with redundant arguments on this issue. But a few arguments raised by Verizon in its *ex parte* submission require a response.

[9] WCA Comments, filed August 5, 2005, at pages 6-30.

A. The Commission Should Decline Verizon's Invitation to Base Its Interpretation of § 332 on Irrelevant Case Law from the "Filed Rate" Era

First, Verizon argues that the Commission should be guided by two D. C. Circuit cases predating the enactment of § 332 that it claims categorized early termination fees outside the CMRS context as "rates." Verizon March 30, 2006 *ex parte* at 7 n.17. But as the Commission held in *WCA*, pre-§ 332 authority from the "filed rate doctrine" era is simply not relevant in any way to the interpretation of § 332. *WCA*, ¶¶ 15-22. Acknowledging, as it must, that *WCA* forecloses the Commission from relying on the *holding* of a "filed rate" case such as MCI, Verizon nevertheless argues that the Commission should follow the *reasoning* of *MCI* because, according to Verizon the court in that case adopted the same definition of "rate" that certain commenting parties in this proceeding have advocated. But Commission authority forecloses the agency from accepting Verizon's invitation to base its interpretation of § 332 on either the holding *or* the reasoning of *MCI*.

Thus, in its motion for reconsideration of the Commission's decision in *WCA*, CTIA argued precisely the same point that Verizon is advancing now:

> Since the proper scope of the Commission's inquiry is the meaning of what constitutes rate regulation for purposes of Section 332(c)(3), the Commission must reconsider its treatment of the filed rate doctrine cases. The filed rate doctrine cases comprise the largest body of case law which sheds light on what actions constitute rate regulation by a state court. [footnote 28]
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> FOOTNOTE 28: CTIA, BellSouth and the other carriers were explicit in their assertion that while the filed rate doctrine itself does not apply to wireless carriers, *the reasoning of these cases* offer[s] significant insight into the appropriate scope of preemption under Section 332(c)(3)....[10]

[10] Petition for Reconsideration of the Cellular Telecommunications Industry Association, filed September 13, 2000, in *In the Matter of Wireless Consumers Alliance, Inc.*, WT Docket No. 99-263, at 10-11 (emphasis added).

In its Order denying reconsideration, the Commission flatly rejected CTIA's suggestion that the reasoning of "filed rate doctrine" cases is relevant to the interpretation of § 332. The Commission stated:

> …CTIA argues that the Commission should have looked to filed rate cases in order to interpret Section 332. While CTIA admits that the filed rate doctrine itself does not apply in the CMRS context, it again argues that *the logic or analysis* of the filed rate cases should apply. As it did in its comments on the WCA Petition, CTIA cites non-CMRS cases premised on the filed rate doctrine…. This question of the applicability of the filed rate doctrine in CMRS cases, however, was fully analyzed in the *WCA Order* and all of the cases cited by the parties were considered by the Commission in reaching its determinations. In that order we found that since there are no filed rates for CMRS services, the filed rate doctrine does not apply. *We further determined that the logic and analysis of the filed rate cases do not apply to the specific statutory preemption established by Section 332*….

WCA Reconsideration Order, 16 FCC Rcd 5618 (2001), ¶ 7 (emphasis added).

In addition to being legally inapposite, Verizon's cases are also distinguishable on their facts. Thus, in *MCI Telecommunications Corporation v. FCC*, 822 F.2d 80 (D.C. Cir. 1987), the only issue was whether the Court should reverse the Commission's determination that certain cancellation and discontinuance charges were "rates" *within the meaning of a settlement agreement* arising from a proposed revision of interstate private line tariffs for wireline service. The cancellation charges had nothing in common with wireless carriers' ETFs, and the case didn't implicate any issue relating to state liquidated damages laws or preemption. Whether such charges were properly deemed to be "rates" for purposes of a settlement agreement under wireline-based tariff law has nothing to do with whether ETFs are "rates charged" for wireless service under § 332.

Equipment Distributors' Coalition, Inc. v. FCC, 824 F.2d 1197, 1201 (D.C. Cir. 1987), is even less relevant. The court in that case referred to the premature termination fees at issue only as "charges," never as "rates." 824 F.2d at 1199, 1202. Moreover, the court held that imposition of charges for early termination of long-term equipment (CPE) leases was not inherently anti-competitive, in part because it found that they were remedies for breach of contract that were "not in any way disproportionate to the costs that would otherwise not be recovered on account of the customers' premature termination. *Id.*, 824 F.2d at 1201-1202. Here, unlike in *Equipment Distributors' Coalition*, it is contended that the ETF clauses in certain wireless carriers' service agreements appear to be penalty clauses rather than valid liquidated damages provisions. In short, *Equipment Distributors' Coalition* is about anti-competitive conduct in equipment leasing, not about what constitutes a "rate."

B. Verizon's Attempts Are Unavailing to Distinguish the Many Cases Holding that ETFs, or Charges Like Them, Are Not "Rates Charged"

Verizon also tries to distinguish the dozen or more cases that have held that ETFs, or similar charges, are not "rates charged" within the meaning of § 332.[11] But its attempts to do so are unavailing. First, Verizon demeans these cases as "unpublished." But they are not "unpublished." *Esquivel v. Southwestern Bell*

[11] *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 at *36 (S.D. Iowa 2004); *Carver Ranches Washington Park v. Nextel South Corp.,* Case No. 04-CV-80607 (S.D. Fla. Sept. 23, 2004), attached to WCA's Initial Comments as Exhibit A; *Gatton v. T-Mobile USA, Inc.,* 2003 U.S. Dist. LEXIS 25922 (C.D. Cal. April 18, 2003); *Kinkel v. Cingular Wireless, LLC,* Case No. 02-999-GPM, slip op. at 4 (S.D. Ill. Nov. 8, 2002), Exhibit G to the CTIA Petition; *State of Iowa v. United States Cellular Corporation* 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000); *Cedar Rapids Cellular Telephone LP v. Miller*, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa 2000); *Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996); *Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wireless,* 2004 Cal. PUC LEXIS 577 (December 16, 2004), attached as Exhibit C to WCA's Initial Comments. *See Brown v. Washington/Baltimore Cellular Ltd. Ptp.*, 109 F. Supp. 2d 421 (D. Md. 2000) (case challenging wireless company's late fees not preempted under § 332); *Mountain Solutions v. State Corporation Commission of Kansas*, 966 F. Supp. 1043 (D. Kan. 1997) (holding state laws requiring cellular providers to contribute money to state-run universal service programs not preempted by § 332); *Dakota Systems, Inc. v. Viken,* 694 N.W.2d 23, 40, 2005 S.D. LEXIS 28 (So. Dakota Supr. Ct. Feb. 23, 2005) (state licensing and tax statutes not preempted by § 332). *See also Fedor v. Cingular Wireless Corp.,* 355 F.3d 1069 (7th Cir. 2004) (suit alleging improper billing not preempted by § 332);

Mobile Systems, *Fedor*, *Brown*, *Mountain Solutions* and *Dakota Systems v. Viken* are published in official reporters. Almost all of the other cases cited in footnote 10, above, are available on LEXIS and Westlaw. They are all citable under the rules of the courts that issued them. And these are not isolated or obscure courts – they are federal district courts in Iowa, California, Illinois, Texas, Maryland and Kansas, with the Seventh Circuit Court of Appeals and the South Dakota Supreme Court thrown in for good measure. Verizon's real point in asserting that the cases are unpublished is that the Commission should feel free to disregard them. But if the Commission were to accept that invitation, what would await the agency on the far bank of the Rubicon would be certain reversal.

This overwhelming weight of authority will not go away.[12] To grant CTIA's petition, the Commission would have to distinguish these cases. And they are not distinguishable. Verizon's sole effort at distinguishing them is to suggest that they should be ignored because they "arose in the context of removal to federal court, where the issue was the existence of federal question jurisdiction, which depends on the doctrine of 'complete preemption.'" But that is a truly disingenuous argument.

To determine whether a claim is "completely preempted" by § 332 for purposes of federal subject matter jurisdiction after removal, a federal court must make two determinations: It must decide as a matter of law whether § 332 confers "complete preemption" over challenges to "rates" and "market entry," *and* it must determine whether or not the claim at issue is a challenge to "rates" or "market

[12] Verizon, like CTIA before it, persists in the pretension that there is a "split" in authority on the issue of whether ETFs are "rates." There is not. As WCA pointed out in its initial comments, the cases on which CTIA and Verizon relies in this connection (*see* Verizon March 30, 2006 *ex parte*, at 7 n. 16) are the jurisprudential equivalent of the lame, the halt and the blind. Some of them do not even purport to decide the question of whether ETFs are "rates charged." In others, the court decided in favor of the defendant carrier because the consumer plaintiff did not contest the matter; and one of the cases, *Consumer Justice*, was decided by a court employee rather than a judge and is not even citable. *See* WCA Initial Comments, at pages 23-30.

entry" within the meaning of the statute. Unless both questions are resolved in the affirmative, there is no federal subject matter preemption and the case must be remanded. Therefore, a negative answer on *either* or *both* of these issues will result in the remand of the case to state court.

Not all of the cases that WCA has cited arose in the removal/complete-preemption context. But in each of those that did, the courts resolved the *second* prong of the "complete preemption" test – that is, they decided whether the claims at issue challenged "rates" or "market entry" under the statute, and determined that they did not.

While "doctrinally," as Verizon puts it, it is possible to have a case in which "complete preemption" for purposes of federal jurisdiction is lacking but the cause of action is nevertheless held to be preempted, that is not what happened in any of the cases that WCA has cited. For example, in *Phillips*, *supra*, probably the most thoughtful and carefully reasoned of all of the cases that have considered this issue, the court found that § 332(c)(3)(A) completely preempts all challenges to "rates charged" and "market entry," creating federal removal jurisdiction over such challenges. The only issue that remained for the Court to decide was whether AT&T Wireless's ETFs in that case were "rates charged" – the very issue raised by the CTIA Petition. The Court held that they were not. In other words, the Court held that it lacked federal subject matter jurisdiction over the action because, and *only* because, the defendant's ETFs were not "rates charged." That the case arose on removal is a distinction without a difference. The Court decided the very issue that CTIA has asked the Commission to address, and decided it adversely to the position that CTIA has asked the Commission to adopt.

The same is true of *U.S. Cellular*, *Cedar Rapids*, *Esquivel*, *Kinkel*, *Carver Ranches* and *Gatton*. The courts in those cases held that claims challenging ETFs were not "completely preempted," but they reached that decision on the grounds that the ETFs of the carriers in question were not "rates charged" within the meaning of § 332. Accordingly, Verizon and CTIA have not distinguished, and cannot distinguish, these cases in any meaningful way.

C. Verizon Misconstrues WCA's Arguments

Finally, in its *ex parte* submission, Verizon criticizes the opponents of the CTIA petition for asserting that ETFs are not "rates charged" because they are not directly based on each carrier's costs. *See* Verizon March 30, 2006 *ex parte*, at p. 2 ("The opponents' argument that an ETF must have some particular 'cost-basis' in order to qualify as a rate…is meritless."); *Id.* at p. 5 ("The commenters advance a cramped definition of rates under which only those charges that are based on actual, direct costs qualify as 'rates charged.'") But that is a mere straw man. WCA has never argued that whether or not ETFs are "rates" depends on whether they have a "cost basis." Indeed, WCA affirmatively submits that preemption *does not* depend on whether ETFs have a "cost basis." Rather, it depends on the language and legislative history of the statute, the factors cited and discussed in well-reasoned cases such as *Phillips*. The verdict of the case law is clear: ETFs are not "rates charged" for service.

VI. CONCLUSION

The Commission must resist the efforts by CTIA and its member carriers to lure it across the Rubicon. To cross that river, the FCC would have to abruptly reverse its own well-reasoned opinions in *WCA* and other cases, flout the overwhelming authority of federal and state courts throughout the country and interfere with the contract and consumer protection principles that have been enshrined in the laws of the 50 states for centuries. The Commission should deny the CTIA Petition.

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